A

E & E MODULAR SYSTEM SDN BHD

v.

UTAMA KEKAL SDN BHD; PEMBINAAN MASRAFAN SDN BHD (GARNISHEE)

B

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG DAK WAH J
[SUIT NO: S-22-123-2005-III]
26 JANUARY 2008

C

CIVIL PROCEDURE: *Execution - Garnishment order, appeal against - Debt owed by garnishee to judgment debtor for work done as sub contractor of government project - Garnishee in turn to be paid by government as main contractor of project - Whether garnishee not paid* D *by government when garnishee order was made - Whether court had discretion to refuse order in the circumstances - Rules of the High Court, O. 49 rr. 1, 5*

This was the garnishee's appeal against the garnishment order by E the senior assistant registrar ('SAR'). The garnishment order was made upon an application by the judgment creditor who obtained a judgment against the judgment debtor ('JD') in the sum of RM266,591. The garnishee was the main contractor appointed by the Malaysian government for construction works in a project F whilst the JD was the sub contractor appointed by the garnishee to carry out the mechanical and electrical works therein.

Held (allowing the appeal):

(1) When the garnishee decree nisi was made absolute, the G garnishee was yet to be paid by the Malaysian government. As such, it had no money in its accounts. In the circumstances, the question was whether the SAR should have made absolute the garnishee decree nisi. Order 49 r. 1 Rules of the High Court 1980 ('RHC') provides that "the court may" which H meant that the court still retained a discretion and might refuse to make the relevant order if in the circumstances it was inequitable to do so. In the present case, it was not unreasonable to infer that the garnishee could and would only pay the JD when paid by the Malaysian government. In such I circumstances, it was unreasonable to require the garnishee to make the payment. The garnishee would need to use its own money first and wait for the reimbursement from the Malaysian

government. Further, it could prejudice the garnishee in that it could be out of money if the Malaysian government failed to pay them. The fact that it could sue the Malaysian government to recover the money paid provided a consideration to the court not to exercise its discretion in making a garnishment order. It was unreasonable that the garnishee should be punished financially for the act of the JD. (paras 5 & 6)

(2) Even if there was no back to back arrangement as far as payment to the JD was concerned, the appeal should still be allowed. An order pursuant to O. 49 r. 5 RHC should be made to direct the issue of whether there was such an arrangement to be determined by a summary trial. (para 7)

Case(s) referred to:

Kedah Kelang Papan Sdn Bhd v. Hansol Sdn Bhd & Anor (Teknibina Advisory Services Sdn Bhd, Garnishee) [1988] 2 CLJ 194; [1988] 1 CLJ (Rep) 645 HC ***(refd)***

Martin & Ors, Judgment Creditors v. Nadel, Judgment Debtor (Dreshner Bank, Garnishees) [1906] 2 KB 26 ***(refd)***

Thamesa Designs Sdn Bhd & Ors v. Kuching Hotels Sdn Bhd [1993] 4 CLJ 12 SC ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 49 r. 5

For the judgment creditor - George Lim; M/s Battenberg & Talma Advocates
For the garnishee - Arthur Lee; M/s Arthur Lee, Lin & Co Advocates

Reported by Usha Thiagarajah

JUDGMENT

David Wong Dak Wah J:

[1] This is an appeal by the garnishee against the decision of the senior assistant registrar in making a garnishee order nisi absolute on 1 April 2007.

[2] The background to this appeal is this. The judgment creditor obtained a judgment against the judgment debtor in the sum of RM266,591. In executing the judgment the judgment creditor obtained an order of garnishment against the garnishee from the senior assistant registrar who in his grounds of judgment relied on the case *Kedah Kelang Papan Sdn Bhd v. Hansol Sdn Bhd (Teknibina*

A *Advisory Services Sdn Bhd, Garnishee)* [1988] 2 CLJ 194; [1988] 1 CLJ (Rep) 645. The garnishee was appointed by the Malaysian Government to execute certain construction works worth the sum of RM123,891,183.93. In executing their construction works, the garnishee appointed the judgment debtor as a sub contractor to
B carry out the mechanical and electrical works for the sum of RM7,274,991. The judgment debtor had been paid the sum of RM6,899,416.89 leaving a balance of RM375,574.11 (the balance sum). The judgment debtor completed their scope of works on 22 December 2004 and 7 July 2005 and the defect liability period
C expired on 22 December 2006 and 7 July 2007 respectively.

[3] In opposing the application to make the garnishee order absolute, the garnishee contended that the balance sum was in fact a retention money which is to be used as a security to cover
D for the defects which may arise during the defect liability period which the judgment debtor would have to remedy and hence in law cannot be a debt due or accruing until the expiry of the defect liability period. That contention of course has been refuted by the case relied on by the senior assistant registrar in his
E decision. In that case after perusing the relevant authorities, the learned judge said:

> From the principles enunciated in the aforesaid cases the following propositions can safely be distilled:
>
> F (1) No garnishee order can be made unless some person, at the time when the order is made, is indebted to the judgment debtor. If there be a debt *in presenti*, of course an order can be made to attach the debt.
>
> (2) If there is not a debt payable *in presenti*, but there is a debt
> G in existence, *debitum in presenti*, but payable in the future, such an order can still be made with regard to the debt whether legal or equitable.
>
> (3) The words "or accruing" are intended to apply to those cases in which there are *debita in praesenti*, *solvenda in futuro*
> H (debts owed at present time payable in the future). It is not enough to show that it is very probable that there soon will be a debt, but it must be shown that there is a debt.
>
> (4) A *debitum in presenti* not yet actually payable is nevertheless
> I a debt which is represented by an existing obligation.

[4] I have no doubt that what the learned judge said reflects the correct status of the law. In fact the Supreme Court in the case *Thamesa Designs Sdn Bhd & Ors v. Kuching Hotels Sdn Bhd* [1993] 4 CLJ 12 applied the same principle of law in determining whether retention money in a construction agreement is liable to be garnished.

[5] In the present case, the garnishee, at the time when the garnishee was made *(decree nisi)*, had not been paid by the Malaysian Government. In other words they had no money in their accounts. This fact is not disputed. The question I pose to myself is whether in such circumstance the garnishee *decree nisi* should have been made absolute by the senior assistant registrar. Order 49(1) RHC provides that "the court may" which means that the court still retains a discretion and may still refuse to make the relevant order if in the circumstance it is inequitable to do so. In *Martin & Ors, Judgment Creditors v. Nadel, Judgment Debtor (Dreshner Bank, Garnishees)* [1906] 2 KB 26, the court refused to make an order of garnishment on the ground that it was inequitable to do so. The circumstance in which the refusal was made was this. The amount due to the judgment debtor was held by the garnishee bank in Berlin with a branch in London. It was contended by the garnishee bank that if they were to be compelled to pay the amount to the judgment creditor they could end up paying the amount due twice if the judgment debtor were to take legal action in Berlin to recover that amount. Because of this possibility, the court saw fit to conclude that it would be inequitable to make the order of garnishment.

[6] In the present case, it is not unreasonable to infer that the garnishee can and will only pay the judgment debtor when they are paid by the Malaysian Government. This inference is based on the fact that the judgment debtor was a sub contractor of the garnishee who in turn was the main contractor of the Malaysian Government. In such circumstance is it fair then to require them to pay? My answer is that it is not. To require the garnishee to pay means that they will need to use their own money first and wait for the reimbursement from the Malaysian Government. Further it could prejudice the garnishee in that they could be out of pocket if the Malaysian Government refuses to pay them. To say that they could sue the Malaysian Government to recover the money paid in fact provides a consideration to the court not to

A exercise its discretion in making an order of garnishment as it is not reasonable that the garnishee should be punished financially for the act of the judgment debtor.

[7] Even if I am wrong to make the inference that there was a
B back to back arrangement as far as payment to the judgment debtor is concerned, I would still allow this appeal and make an order pursuant to O. 49 r. 5 to direct the issue of whether there was such a payment arrangement be determined by a summary trial.

C **[8]** Accordingly, I allow this appeal with costs.

D

E

F

G

H

I